IN THE

SUPREME COURT OF THE UNITED STATES

77-1718

October Term, 1977 Nos. 77-1709,
77-1710, 77-2140, 77-2141

CITY OF PHILADELPHIA, JOSEPH F. O'NEILL,
FOSTER B. ROSER, GEORGE BUCHER,
LEONARD L. ETTINGER, AND HARRISON J. TRAPPE,
CITY OF PHILADELPHIA CIVIL SERVICE COMMISSION,
FRATERNAL ORDER OF POLICE,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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CITY OF PHILADELPHIA, JOSEPH F. O'NEILL, FOSTER B. ROSER, GEORGE BUCHER, LEONARD L. ETTINGER, AND HARRISON J. TRAPPE, CITY OF PHILADELPHIA CIVIL SERVICE COMMISSION, FRATERNAL ORDER OF POLICE, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

TO: THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioners, City of Philadelphia, et al. respectfully pray that a Writ of Certiorari issue to review an order of the United States Court of Appeals for the Third Circuit entered in this proceeding on February 27, 1978.

OPINION BELOW

The Opinion of the Court of Appeals for the Third Circuit appears in the Appendix at A. / . The Opin-

ion and Order of the United States District Court for the Eastern District of Pennsylvania dated April 15, 1977 and the Supplemental Opinion and Order dated April 25, 1977 in Nos. 77-1709 and 77-1710 appear in the Appendix at A.18 and A.21 respectively. The July 13, 1977 Order of the District Court in Nos. 77-2140 and 77-2141 appears in the Appendix at A.24. Also included in the Appendix are the District Court Opinions and Orders of March 5, 1976 (A.25), January 29, 1975 [A.30], November 3, 1977 [A.34] and January 24, 1978 [A.36].

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether, on a motion for a mandatory preliminary injunction in the form of a gender-based quota system specific to a discreet pool of qualified applicants, the Court may properly refuse to consider evidence relating to the non-discriminatory selection of that pool of applicants and issue the requested injunction without identifying the victims of the alleged discrimination and without determining the nature and extent of each such victim's injury?

STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the

> privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the law. . . .

Title 42, United States Code, §2000e-2. Unlawful Employment Practices — Employer Practices.

> (a) It shall be an unlawful employment practice for an employer —
>
> (1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) To limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
>
> * * *
>
> (e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, or an employment agency to classify, or refer for employment any individual, for a labor organization, to classify its membership or to classify or refer for employment any individual or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or

employ any individual in any such program on the basis of his religion, sex or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning, is, in whole or in substantial part, owned, supported, controlled or managed by a particular religion or by a particular religious corporation, association or society, or if the curriculum of such school, college, university or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended

or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to the subchapter to grant preferential treatment to any individual or any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex or national origin employed by an employer, referred or classified for employment by any employment agency or labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage or persons of such race, color, religion, sex, or national origin in any community, State, section or other area, or in the available work force in any community, State, section or other area.

Title 42, United States Code, §2000e-11. Veterans' Special Rights or Preferences.

Nothing contained in this subchapter shall be construed to repeal or modify any Federal, State, territorial or local law creating special rights or preference for veterans.

STATE STATUTORY PROVISIONS:

Title 51, Pennsylvania Consolidated Statutes Annotated, §7102. Credits in Civil Service Examination.

(a). General Rule. When any soldier shall take any Civil Service appointment or promotional examination for a public position under the Commonwealth, or under any political subdivision thereof, he shall be given credit in the manner hereafter provided; for the discipline and experience represented by his military training and for the loyalty and public spirit demonstrated by his service the preservation of his country, as provided in this chapter.

Title 51, Pennsylvania Consolidated Statutes Annotated, §7103. Additional Points in Grading Civil Service Examinations.

(a). Commonwealth Examinations. — Whenever any soldier shall successfully pass a Civil Service Appointment or promotional examination for a public position under this Commonwealth, or any political subdivision thereof, and shall thus establish that he possess the qualifications required for law by appointment to or promotion in such public position, such soldiers examination shall be marked or graded an additional ten points above the mark or grade credited for the examination, and the total mark or grade thus obtained shall represent the final mark or grade of such soldier, and shall determine his standing on any eligible or promotional list, certified or furnished to the appointee or promoting power.

(b). Municipal Examinations. — When any such person shall take any examination for appointment or promotion in the Civil Service of any of the various municipal agencies within this Commonwealth, as required by any existing law or any law which may hereafter be enacted, such person's examination shall be marked or graded fifteen percent perfect before quality or contents of the examination shall be considered. When the examination of any such person is completed and graded, such grading or percentage as the examination merits shall be added to the aforesaid fifteen percent, and such total mark or grade shall represent the final grade or classification of such person and shall determine his or her order of standing in the eligible list.

51 Pennsylvania Consolidated Statutes Annotated, §7104. Preference in Appointment or Promotions.

(a) Non-Civil Service —

Whenever any soldier possesses the requisite qualifications and is eligible to appointment to or promotion in a public position, where no such civil service examination is required, the appointing power in making an appointment or promotion to a public position shall give preference by such soldier.

(b) Name on Civil Service List —

Whenever any soldier possesses the requisite qualifications, and his name appears on any eligible or promotional list, certified or furnished as a result of any such civil service examination, the appointing or promoting power in making an appointment or promotion

> to a public position shall give preference to such soldier, notwithstanding that his name does not stand highest on the eligible or promotional list.

Philadelphia Home Rule Charter, Section 7-300. Purpose.

> The purpose of the civil service provisions of this Charter is to establish to the City a system of personnel administration based on merit, principles and scientific methods governing the appointment, promotion, demotion, transfer, layoff, removal and discipline of its employees, and other incidents of City employment. All appointments and promotions to positions in the Civil Service shall be made in accordance with the Civil Service Regulations.

STATEMENT OF THE CASE

This Petition seeks this Court's review of the February 28, 1978 Order of the United States Court of Appeals for the Third Circuit, affirming the decisions of the United States District Court for the Eastern District of Pennsylvania, per the Honorable Charles R. Weiner, requiring that at least 20% of newly appointed police officers in the City of Philadelphia be female. These orders were entered without any showing whatsoever of gender-based discrimination in the selection process which produced the candidates for appointment.

Two actions[1] were filed in the United States District Court for the Eastern District of Pennsylvania in 1974, alleging, *inter alia*, that the Philadelphia Police Department had engaged in gender-based discrimination in its hiring procedures violative of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e et seq.

The selection procedure for the position of police officer in the City of Philadelphia is a merit system of selection mandated by state and local law,[2] consisting of (1) a competitive written entrance examination; (2) a medical examination; (3) a psychiatric evaluation; and (4) a background investigation. The entrance examination was developed and validated for the position of Philadelphia Police Officer by the Educational Testing Service of Princeton, New Jersey[3] and is used

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1. *United States of America v. City of Philadelphia, et al.*, C.A. #74-400; *Penelope Brace v. Joseph F. O'Neill, et al.*, C.A. #74-339.

2. Act of June 25, 1919, P. L. 581, Art. XIX, 53 P. S. §12633; Philadelphia Home Rule Charter, Title 7, Section 400 et seq.

3. This examination was developed and validated in partial settlement of *Commonwealth of Pennsylvania, et al. v. O'Neill, et al.*, C.A. #70-3500 (E.D. Pa.), a racial discrimination case claiming, *inter alia*, that the Police Department's prior entrance examination unlawfully excluded blacks from employment with the Department. The new examination was approved for use by the Honorable John P. Fullam on October 17, 1974.

by the City as a ranking device above the pass point. Passing applicants are ranked on an eligibility list in descending order of test score, as modified by a veteran's preference bonus where applicable. Pursuant to the Home Rule Charter, Section 7-401(f), an eligible list may remain in force no longer than two years from the date of its establishment. According to rank on the eligibility list, applicants are referred to the medical examination; upon passing the medical examination, the applicants are then referred for psychiatric evaluation. Lastly, applicants who have passed both the medical and psychiatric examinations undergo a detailed background investigation. On passing the background investigation, an applicant is eligible for appointment.

It is an applicant's position on the eligibility list which determines his or her relative standing to enter the remaining portions of the selection process and to ultimately be appointed to the police training academy. With one major exception, the eligible list position is, in turn, generally determined by an applicant's test score relative to all other applicants taking the competitive examination. The major exception alluded to is a veteran's preference bonus of ten points which is added to the test score of passing applicants honorably discharged from the United States Armed Forces.[4]

The Petitioners' prior practices excluded women from applying for the position of police officer in the Philadelphia Police Department. On January 29, 1975, upon the agreement of all counsel, the Court entered an order requiring, inter alia, that the May 31, 1975 examination be given to both male and female applicants, that the examination be given and the eligibility list be established in accordance with Petitioners' current practices and that recruiting and advertising be conducted in normal fashion with the understanding

4. Act of Aug. 1, 1975 P. L. 233, No. 92, 51 Pa. C.S.A. §701 et seq.

that all such efforts be directed to men and women equally.

All recruiting and advertising for the examination were directed at both men and women with special efforts being made to advise females of the new employment opportunities open to them.

On May 31, 1975, 10,551 persons took the examination for police officer, of whom 2,252 were women. Of those test takers, 79% of the male applicants passed the examination, as compared to a 75% pass rate for the female applicants. There is no significant difference between the two pass rates. That men and women competed on equal terms on the May 31, 1975 examination was not and is not now open to dispute. [A. 22]. In accordance with standard operating procedure, the City's Personnel Department ranked the applicants in descending order of test score as modified by veteran's preference where applicable.

After the May 31, 1975 examination had been scored, an eligible list established and some hiring had taken place off that list, the instant litigation went to trial. During the course of trial, on March 5, 1976, the District Court entered an Order embodying an agreement reached by the parties. In pertinent part, that Order provided:

> 2. There are presently approximately four hundred seventy one (471) funded vacancies in sworn positions in the Philadelphia Police Department. In filling such vacancies the City shall graduate from the Police Academy one hundred qualified women from the next five classes, or earlier. In any event there shall be no less than twenty women in any such class, until those one hundred (100) women are graduated. Such persons shall be selected from the present eligibility list generated from the May 31, 1975 examination. Upon graduation from the training academy, such persons shall

> be assigned to police officer positions in the same manner as other graduates are assigned. [A. 26].

Consistent with that Order, the City selected 100 women for the next five police academy classes. In order to hire the 100 women, the City went down to rank number 3979 on the eligibility list. At the same time, in order to hire the 371 male officers, the City did not go beyond rank number 820 on that same list. Necessarily, the March 5, 1976 Order insuring the graduation of 100 women from the police training academy required that women be selected out of order on the eligibility list, the last women of that group having been jumped over more than 3000 males ranked ahead of her on that list.

On April 1, 1977, the City advised the Court and the respondents that the City intended to hire 100 police officers in rank order from the eligibility list beyond the 471 persons previously hired. After hearing on respondents' application for a preliminary injunction, the Court entered its Order of April 25, 1977 establishing, *inter alia*, a 20% female quota for those appointments. Despite the utter absence of any supporting language in its March 6, 1976 Order, the Court stated: "We were and remain under the impression that the letter and spirit of counsel's agreement as evidenced by the Court's order contemplated that the proportion of females previously employed would be the standard to be adopted for all future hirings pending final decision of the court." [A. 22]. Further, the Court found that the City had admitted the fact of gender-based discrimination, completely ignoring the City's and the Court's own previous efforts to insure that the May 31, 1975 recruitment and examination were free from such bias. In subsequent hirings by the City for police officer, the Court again imposed a 20% quota through its Orders of July 13, 1977 [A. 24] and November 3, 1977. [A. 34]. Finally, the Court's successive quotas having

resulted in all females on the applicant eligibility list being processed for appointment, the Court, by its Order of January 24, 1978, allowed the hiring of an all male class but only with the explicit reservation of positions for females when a new list would be established. [A. 36].[5]

In initially adopting its quota, on April 25, 1977, the Court noted that the gender of an applicant played no part at all in the selection process for employment at issue, namely the eligible list produced by the May 31, 1975 examination. [A. 22]. Further, it should be remembered that there is no significant difference in the male/female pass rates for the May 31 examination. There is no claim that the entrance examination adversely impacts upon female applicants. There is no claim that any other portion of the selection process adversely impacts upon female applicants. There is no claim that females were excluded from taking the May 31, 1975 examination. There has been no showing that any of the intended beneficiaries of the Court's quota orders were ever victimized by any gender-based discrimination on the part of defendants.

Lastly, it should be pointed out that, in part, the eligible list is, in fact, skewed in favor of males; that is, males disproportionately appear in the upper reaches of the list. The sole cause for this phenomenon is the veteran's preference bonus which results in an award of 10 points to passing veterans.[6]

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5. The District Court's orders of April 25, 1977 and July 13, 1977 were affirmed by the Court of Appeals as Appeal Nos. 77-1709, 77-1710, 77-2140 and 77-2141. The District Court's order of November 3, 1977 is pending in the Court of Appeals under Appeal Nos. 77-2597 and 77-2598. The January 24, 1978 Order was appealed as of No. 78-1327. Petitioners have moved to consolidate Nos. 77-2597, 77-2598 and 78-1327 with the Nos. 77-1709, 77-1710, 77-2140 and 77-2141. That motion is pending in the Third Circuit Court as of this writing.

6. Those persons with a total score between 100 and 110 (i.e., veterans with a test score between 90 and 100) were overwhelmingly male.

On appeal to the United States Court of Appeals for the Third Circuit, the lower court's orders were affirmed. The Circuit Court held that the District Court "acted well within its discretion in entering a preliminary injunction requiring the defendants to meet a hiring goal similar to that of the interim consent order of March 5th . . ." [A. 9]. The Court held that the likelihood of plaintiff 's success on the merits on final hearing was strong given defendants' admission of sex-based discrimination. The Circuit Court ignored the fact that the admission was only with respect to entrance examinations given prior to 1975. There was no such admission with respect to the May 31, 1975 examination which was open to male and female applicants alike and in which no adverse impact can be found in the test data and no discriminatory treatment can be found in the evidence.

The Circuit Court also held that the District Court did not err in presuming irreparable injury would result if it failed to enter a preliminary injunction notwithstanding the absolute lack of any evidence whatsoever suggesting that any female on the eligibility list produced by the May 31, 1975 examination had ever, at any time, been victimized by either pre-act or post-act gender-based discrimination. Finally the Third Circuit Court held that the District Court's order recognized the interests of third parties and the public, notwithstanding the fact that it effectively repudiated merit selection, circumvented the State and City's system of veteran's preference and deprived higher ranking males on the eligibility list of an opportunity for employment solely on the basis of their sex.

Petitioners respectfully request this Honorable Court to issue a Writ of Certiorari to the United States Court of Appeals for the Third Circuit to review its February 27, 1978 Opinion and Order.

REASON FOR GRANTING THE WRIT

ON MOTION FOR A MANDATORY PRELIMINARY INJUNCTION IN THE FORM OF A GENDER-BASED QUOTA SPECIFIC TO A DISCREET POOL OF QUALIFIED APPLICANTS, THE COURT BELOW IMPROPERLY REFUSED TO CONSIDER EVIDENCE RELATING TO THE NON-DISCRIMINATORY SELECTION OF THAT POOL OF APPLICANTS AND IMPROPERLY ISSUED THE REQUESTED INJUNCTION WITHOUT IDENTIFYING THE VICTIMS OF THE ALLEGED DISCRIMINATION AND WITHOUT DETERMINING THE NATURE AND EXTENT OF EACH SUCH VICTIM'S INJURY.

It is well settled that liability can not be found nor relief be granted under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., without a prima facie showing of a violation of that statute. *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 52 L.Ed. 2d 396 (1977); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). It is equally well settled that the scope of an injunctive remedy is defined by the breadth of the constitutional or statutory violation found to exist. *International Brotherhood of Teamsters v. United States,* supra; *Rizzo v. Goode,* 423 U.S. 362 (1976); *Milliken v. Bradley,* 418 U.S. 717 (1974); *Pasadena City Board of Education v. Spangler,* 427 U.S. 424 (1976). The judicial power and discretion with respect to preliminary injunctive relief is more narrowly limited. The purpose of the preliminary or interlocutory injunction is to preserve the status quo and to prevent irreparable injury *pendente lite,* and such an injunction can only issue on a showing of irreparable injury to the movant if the injunction is not granted. *Sampson v. Murray,* 415 U.S. 61 (1974); *Doran v. Salem Inn, Inc.,* 422 U.S. 922 (1975); *Yakus v. United States,* 321 U.S. 414 (1943); *Diversified*

Mortgage Investors v. U.S. Life Ins. Co., 544 F.2d 571, 576 (2nd Cir., 1976).

Here, the United States sought and the Court granted a mandatory preliminary injunction, not with respect to the case as a whole, but rather in regard only to hiring from the May 31, 1975 eligible list. The orders of the District Court have substantially altered the last uncontested status quo by requiring that 20% of each Police Academy class of new appointees be female, though selections to those classes were made from a bias free eligibility list.

In reaching its decisions, the District Court totally ignored the test data and other evidence of non-discrimination with respect to all hiring which took place after the May 31, 1975 examination. Furthermore, the District Court ignored its Order of January 29, 1975, in which the Court itself authorized the administration of the qualifying examination which was given on May 31, 1975, directed that recruitment in advertising be done in their normal fashion with such recruitment and advertising being directed at males and females equally, and directed that the eligible list be established in accordance with the regular operating procedures of the Police and Personnel Departments. Despite its recitation of the *stipulated* facts that hiring was being conducted in rank order from the eligibility list, that the selected males who were to be employed had simply recorded higher marks in the examination as compared with females, and that the *gender of the applicant played no part in the employment process*, the Court held that it need not decide the issue of the presence or absence of gender-based discrimination in the hiring process which was the subject of the application for an interlocutory injunction. [A. 22]. Thus in considering the application for preliminary injunctive relief as to hiring from the eligibility list produced by the May 31, 1975 examination, the Court expressly refused to consider the only

relevant evidence before it, i.e. evidence relating to the absence of gender-based discrimination in that list. Rather, the Court considered only defendants' admission of such discrimination as to examinations given and lists established long before the May 31, 1975 examination, which had been long since discarded and which were *not* the subject of the application for interlocutory relief.

In *International Brotherhood of Teamsters v. United States*, supra, this Court propounded guidelines for the exercise of judicial discretion in employing remedial powers in Title VII cases. Stressing that the purposes of the remedial provisions of Title VII are to place victims of discrimination in their rightful place, i.e., the position the discriminatee would have had but for the discrimination complained of, this Court pointed out that factual inquiry on the part of the trial court was required. *International Brotherhood of Teamsters v. United States*, supra, 52 L.Ed. 2d at 437-38. In determining who the discriminatees are and how they are to be made whole, this Court clearly contemplated that the trial judge was to hold a hearing or otherwise factually determine the identity of the alleged victims and the nature and extent of their injury. Referring to the trial court's duty in *International Brotherhood of Teamsters v. United States*, this Court held that, on remand, "After the victims have been identified the [trial] court must, as nearly as possible, 'recreate in conditions and relationships that would have been had there been no' unlawful discrimination. Citing *Franks v. Bowman*, 424 U.S. 747, 769 (1976).

Here the District Court made no such inquiry. Rather it necessarily assumed that all females on the eligibility list were victims of sex discrimination, although the nature of that discrimination was not explicitly or implicitly defined. Thus, it also must necessarily be assumed that the nature of the discrimination was inherent in the test which determined

eligibility list position, and finally, it must be assumed that the extent of the injury was that each and every woman on the list would have been processed for appointment beyond the testing stage but for the discrimination inherent in the test. No evidence exists anywhere in this record which would support these implicit prerequisites to the District Court's quota order. There is neither evidence nor claim of any disparate impact resulting from the test other than the male/female distribution on the eligibility list which is skewed as a result of veterans' preference. Veterans' preference is, of course, expressly insulated against attack in Title VII itself. Section 712 of the Act, 42 U.S.C. §2000e-11 provides that:

> Nothing contained in this subchapter shall be construed to repeal or modify only Federal, State, teritorial or local law creating special rights or preference for Veterans.

This Court on many occasions has ruled that the scope of equitable relief must be consistent with the scope of the violation found to exist. *Rizzo v. Goode*, 423 U.S. 362 (1976); *Milliken v. Bradley*, 418 U.S. 717 (1974); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1(1971). Even assuming arguendo, the existence of any finding of any gender-based discrimination in selection from the May 31, 1975 examination for the position of police officer, the courts below made no effort to identify the victims of same or to determine the nature and extent of the injury to them.

Lastly, this Court pointed out in *Teamsters* that special caution had to be observed in fashioning an equitable remedy.

> Although not directly controlled by the Act, the extent to which the legitimate expectations of

> non-victim employees should determine when victims are restored to their rightful place is limited by basic principles of equity. In devising and implementing remedies under Title VII, no less then in formulating any equitable decree, a court must draw on the "qualities of mercy and practicality [that] have made equity the instrument for nice adjustment and reconcilliation between the public interest and private needs as well as between competing private claims." Especially when immediate implementation of an equitable remedy threatens to impinge upon the expectations of innocent parties, the courts must "look to the practical realities and necessities inescapably involved in reconcilling competing interest," in order to determine the "special blend of what is necessary, what is fair, and what is workable," [citations omitted]. *International Brotherhood of Teamsters v. United States*, 52 L.Ed. 2d at 439-40.

Again, this Court's admonition was disregarded. The rights and the interests of non-victim males on the eligibility list who were denied employment simply because of their sex were ignored. The protection in Title VII itself of the interest of the veterans on the eligibility list was circumvented. With no evidence of any discrimination, with no evidence that any female on the eligibility list was a victim of any unlawful employment practice, the courts below, solely on the basis of gender, denied employment opportunity to male applicants having a higher position on a valid and untainted eligible list than their female counterparts.

As the Circuit Court of Appeals pointed out, a party seeking a preliminary injunction must establish that he or she or the class he or she represents will suffer

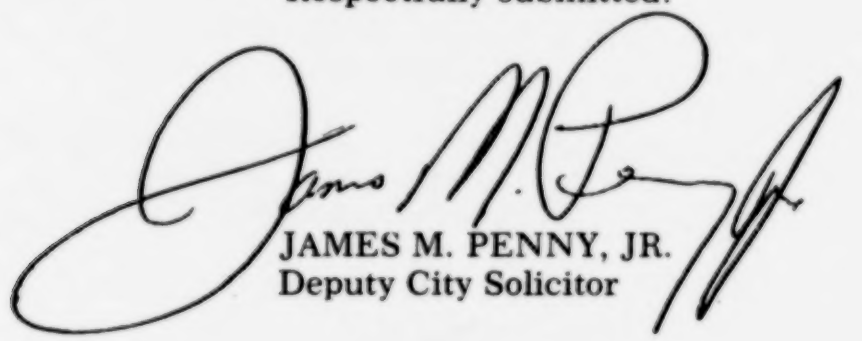
irreparable injury *pendente lite* if the requested injunction is not granted. Here, there was no evidence of any injury to any female taking the May 31, 1975 examination. Nevertheless the Circuit Court held that the District Court acted within its discretion to *presume* injury, despite the total dearth of evidence. The Court of Appeals pointed out that the interests of third parties and the public must be considered in ruling on an application for preliminary injunction. Here, the public interest and the rights of third parties were ignored. The public interest lies in non-discriminatory selection procedures, yet the courts below opted for an unwarranted gender-based quota system. The public interest and the public policy of both the Commonwealth of Pennsylvania and the United States of America is to confer certain preferential rights on Veterans of our military services in taking civil service examinations. This public interest and public policy were frustrated, and the veterans' preference insulation contained in Title VII itself was circumvented. The rights of males on the eligibility list who had competed equally with females in taking the examination were ignored. The respondents failed to satisfy any of the prerequisites to preliminary injunctive relief.

It is respectfully submitted that the pronouncements of this Court in *International Brotherhood of Teamsters v. United States*, supra, have been honored by the courts below only in their breach. In an application for preliminary injunction where no relief was warranted, the most draconian, contraversial, abrasive remedy imaginable, i.e., a quota system, was imposed by the court. It is without basis in fact and in law, and your petitioners respectfully submit that the Circuit Court of Appeals erred in affirming the orders of the District Court.

CONCLUSION

For the foregoing reasons, your petitioners respectfully submit that a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted:



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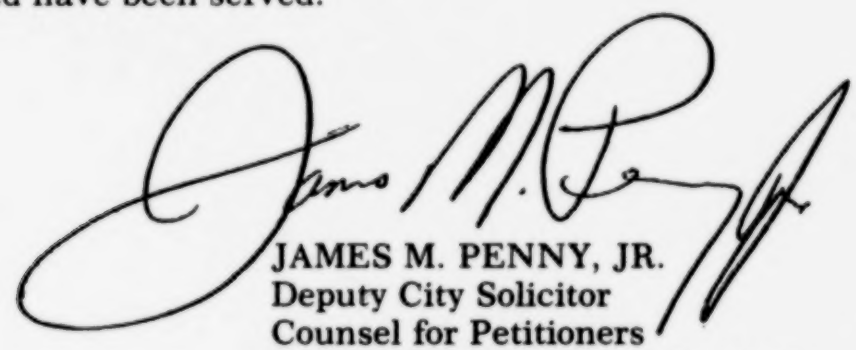
CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of May, 1978, three (3) copies of the Petition for Writ of Certiorari were hand delivered to the offices of:

Robert DeLuca, Esquire
United States Attorney
3310 United States Courthouse
601 Market Street
Philadelphia, Pa. 19106

John M. Gadzichowski, Esquire
Department of Justice
Washington, D.C. 20503

I further certify that all parties required to be served have been served.



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IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 77-1707/77-1711 and 77-2140/77-2141

UNITED STATES OF AMERICA
v.
CITY OF PHILADELPHIA, a Municipal Corp.,
JOSEPH F. O'NEILL, Comm., Philadelphia Police Department;
FOSTER B. ROSE, Director of Personnel, City of Philadelphia;
GEORGE BUCHER, LEONARD L. ETTINGER, & HARRISON J. TRAPP,
Comm., City of Philadelphia Civil Service Comm.,
Appellants in No. 77-2141
FRATERNAL ORDER OF POLICE, Intervening Deft.
CITY OF PHILADELPHIA,
Appellant in Nos. 77-1707/77-1709
FRATERNAL ORDER OF POLICE,
Appellant in No. 77-1710 and No. 77-2140
UNITED STATES OF AMERICA,
Appellant in No. 77-1711

(D. C. Civil No. 74-400)

On Appeal from the United States District Court for the Eastern District of Pennsylvania

Argued October 20, 1977
Before: ROSENN and GARTH, *Circuit Judges*, and LACEY,*
District Judge.

OPINION OF THE COURT
(Filed February 27, 1978)

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*Frederick B. Lacey, United States District Court, District of New Jersey, sitting by designation.

LACEY *District Judge*

PRELIMINARY STATEMENT

Appeal Nos. 77-1707, 77-1708 and 77-1709 were taken by the defendants from orders of the United States District Court for the Eastern District of Pennsylvania granting the United States' motions for injunctive relief. Appeal No. 77-1710 was taken by the defendant-intervenor Fraternal Order of Police from an order of the district court granting a motion of the United States for injunctive relief. Appeal No. 1711 was taken by the United States from an order of the District Court denying a motion for injunctive relief. Our jurisdiction over these appeals was properly invoked under 28 U.S.C. §1292(a)(1); and they are now before us by virtue of our order of consolidation of June 28, 1977.

PROCEDURAL HISTORY

On February 19, 1974 the United States filed suit against the City of Philadelphia, the Commissioner of Police, the Director of Personnel, and the City of Philadelphia Civil Service Commissioners [hereinafter the City or defendants].[1] The complaint alleged, inter alia, that the Philadelphia Police Department was engaged in a pattern or practice of employment discrimination against females in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.*, the fourteenth amendment, and the guidelines of the Department of Justice and the Law Enforcement Assistance Administration [LEAA] which provide for equal employment opportunity in federally assisted programs and activities, 28 C.F.R. §42.201 *et seq.* Specifically, the complaint alleged that the defendants had discriminated against female employees and applicants for employment in their recruiting, hiring, promotion, transfer and assignment practices.[2]

1. The Fraternal Order of Police was permitted to intervene as a defendant by the district court's order of August 5, 1975.

The United States' action was consolidated with a related lawsuit filed on February 12, 1974 by Policewoman Penelope Brace.[3]

On February 10, 1976 trial in the consolidated cases commenced. After the plaintiffs had completed their case-in-chief and the defendants had begun to present their evidence, the United States and the defendants agreed to the entry of an interim order, which was entered on March 5, 1976 (the March 5 order).

On March 15, 1976 the district court entered an order dismissing this case without prejudice to the rights of the parties to seek enforcement of the March 5 order.

The five appeals before us are from decisions of the district court on four separate motions filed by the United States subsequent to the entry of the March 5 order. They relate to three separate matters:

Nos. 77-1707 and 77-1708 are appeals by the City and concern the applications of incumbent policewomen to transfer from the all female line of progression (policewoman) to the all male line of progression (policeman).

2. On the same date that the United States filed its complaint, it also filed an application for a temporary restraining order and a motion for a preliminary injunction. In its moving papers it sought to have the defendants restrained from dismissing Policewoman Penelope Brace. It alleged that her impending dismissal was in retaliation for having filed charges of discrimination with the Equal Employment Opportunity Commission [EEOC] and LEAA. Brace was subsequently reinstated by the City of Philadelphia.

3. On February 12, 1974 Brace filed an action on behalf of herself and all other females similarly situated. Her complaint also alleged that the Philadelphia Police Department was engaged in a pattern or practice of discrimination against females (Brace v. O'Neill, et al., C.A. 74-339). The Brace action was subsequently stayed, and she filed a separate appeal. On November 10, 1977 we dismissed the appeal for lack of jurisdiction. [Brace v. O'Neill, No. 76-2207, slip op. at 14-15 (3d Cir. November 10, 1977)].

Nos. 77-1709 and 77-1710 are appeals by the City and the Fraternal Order of Police, respectively, from an order requiring the defendants to hire twenty female police officers in conjunction with the hiring of 100 new male police officers.

No. 77-1711 is an appeal by the United States from the failure of the district court to find that the defendants discriminated against Shirley Terry, a female police officer, when they fired her based on the expressed reason that her pregnancy rendered her physically incapable of continuing to perform the duties of a police officer.

DISCUSSION

A. The March 5 Order

This order suspended the trial for a period of up to two years, during which time the defendants would be permitted to develop additional evidence.[4] Also, the order provided substantive interim relief for females, summarized as follows:

1. The defendants were enjoined from engaging in acts or practices which had the purpose or effect of discriminating on the basis of sex;

2. The job titles of policeman and policewoman were abolished and the entry level position became police officer;

3. The defendants were instructed to fill approximately 470 police officer vacancies with both qualified males and qualified females. The City was directed to graduate one hundred qualified women from the next five classes at the police academy, or earlier. Of these, no less than twenty were to be in any such class. Selection was to be based on the eligibility list generated by the May 31, 1975 entrance examination. Upon graduation from the training academy the women were to be assigned to police officer positions.

4. Incumbent policewomen (juvenile aid officers) were to be afforded an opportunity to transfer to and compete for promotion within the police officer (policeman) line of progression.

5. Finally, the order provided for the district court's retention of jurisdiction and for a deferral of the issues not addressed by the order.

4. Among other things the defendants, relying upon the "bona fide occupational qualification" defense (BFOQ), 42 U.S.C. §2000e-2(e)(1), wanted to study the performance of women as police officers.

In addition to the terms of the March 5 order, Sheldon L. Albert, the Philadelphia City Solicitor, and the defendants' representative, provided the United States with a letter of understanding dated February 27, 1976. In this letter the defendants agreed: (1) to provide the United States with not less than sixty days' notice prior to the filling of any vacancies above the approximate figure of 470 contemplated by the order; (2) to give the United States an opportunity to review, if necessary, records bearing upon the question of comparable experience for females who transfer to police officer; and (3) to consult with the United States on the content of any remedial training to be offered female transferees.

B. Hiring of Police Officers in Addition to the Approximate 470 Contemplated by the March 5 Order — App. Nos. 77-1709 and 77-1710

On April 1, 1977 the defendants advised the district court that on or about April 18, 1977 they intended to appoint a police recruit class consisting only of 100 men. The United States moved at once to enjoin the noticed hiring unless at least twenty percent (20%) of the new hirees were female, alleging that the additional hiring was violative of Title VII and of the March 5 order, that it perpetuated the effects of past discriminatory employment practices, and that the de-

fendants had failed to give the United States the agreed sixty days' notice prior to the additional hiring.

On April 15, 1977 the district court entered an order enjoining the defendants from hiring the all male police class, stating:

> That the Police Department discriminates against employing women as police officers is uncontested. The threshold question that will not be resolved until all evidence . . . [is] presented to the Court, is whether the Police Department is justified in refusing to employ females as police officers because of the "bona fide occupational qualification" exception provided for in Section 703(e)(1), 42 U.S.C. §2000e-2(e)(1). The burden of proof is upon the defendants to demonstrate that their contention falls within the "bona fide occupational qualification" exception. *Weeks v. Southern Bell Telephone Co.*, 408 F.2d 228 (5th Cir. 1969). As previously noted, the resolution of this issue is not ripe for decision. Concluding that the defendants are prima facie in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, *et seq.* and presuming that irreparable injury will result from said violation, *United States v. Hayes International*, 415 F.2d 1038 (5th Cir. 1969), the Court will enjoin the appointment of only males to the Police Academy (App. 760a-761a).

After the entry of this order, a further evidentiary hearing was held at defendants' request, following which, on April 25, 1977, the district court amended its order of April 15 and issued a supplemental opinion, stating:

> During the course of several evidentiary hearings, occurring prior to March 5, 1976, the record clearly established that it was the policy of the police department to reject applications of females for em-

> ployment as police officers. In fact, the defendants did not contest this allegation but to the contrary relied completely upon the "bona fide occupational qualification" exception provided for in Section 703(e)(1) 42 U.S.C. §2000e-2(e)(1). Believing that the answer to the qualification issue might be resolved by providing an opportunity for females to perform the duties of a police officer, counsel presented to the Court certain proposals which were acceptable and embodied in the Court's order of March 5th. In substance, the order provided that one-hundred [sic] (100) women were to be employed to fill vacancies in the police department out of approximately 471 existing vacancies. The male and female candidates were not chosen in the order in which their names appeared on the police eligibility list. In order to reach female candidates, it was necessary to pass over males whose position on the list was much higher than the selected females. . . . With respect to future appointments, we were and remain under the impression that the letter and spirit of counsels' agreement as evidenced by the Court's Order contemplated that the proportion of females previously employed would be the standard to be adopted for all future hirings pending final decision of the Court. Without any change in circumstances the police intend to appoint one-hundred [sic] (100) males to the Police Academy excluding all females. To justify this employment practice the defendants now contend that the choice of an all male class is no longer tainted with the color of discrimination in employment because of one's sex. The stipulated facts indicated that the members of the proposed class were taken in rank order from the eligibility list. That 10,551 persons took the examination, 2,252 of whom were women. That the selected males who were to be employed had simply recorded higher

marks in the examination as compared with females and thus the gender of the applicant played no part in the employment process. We need not decide that issue, however, for in our view this Court's Order of March 5th closed the question of discriminatory employment and left open only the issue of "bona fide occupational qualification" exception. But that is not the end of our inquiry. As noted in our Opinion of April 15, 1977, the parties had agreed upon sixty (60) days' notice to be given before any new vacancies were to be filled. Unfortunately, the City, in total disregard of its agreement, advised the male members of the contemplated class of their appointment to the Police Academy. The Court has been advised that more than fifty percent of those who received this notice resigned from their previous employment and now are unemployed, their families now suffering from financial insecurity. Had the covenant been followed, it appears apparent that this incident could have been avoided as the appointees would have had sixty days' notice instead of the fourteen days' notice which was given to the plaintiff. We are of the opinion that the circumstances recited above mandate the exercise of the Court's discretion to frame a decree that would provide equitable relief. Erie Human Relations Commission v. Tullio, 403 F.2d 371 (3d Cir. 1974). (App. 783a-786a).

The district court's amended order provided in pertinent part:

In order to eliminate the hardship sustained by the proposed male appointees and to eliminate alleged discrimination because of sex pending the final resolution of this action, the defendants are directed to hire 120 persons as police officers who are appointed to the police academy. This class of 120 appointees shall be composed of:

(a) the 100 males who had previously been notified of their appointment, and

(b) 20 females whose names shall be selected in rank order from the current eligibility list, as suggested by the United States. (App. 787a.)

The City and the Fraternal Order of Police each filed notices of appeal from this amended order on April 26, 1977.[5]

We find that the district court acted well within its discretion in entering a preliminary injunction requiring the defendants to meet a hiring goal similar to that of the interim consent order of March 5, when the defendants sought to hire officers in addition to those provided for in that order. *Oburn v. Shapp*, 521 F.2d 142 (3d Cir. 1975). Given the obvious justification for its finding of discriminatory employment practices, the district court acted properly to frame a decree which would not only further the purposes of Title VII and achieve equality of employment opportunity, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975), but would also prevent action by the defendants inconsistent with the March 5 order.

The granting of preliminary relief was clearly proper under *Oburn v. Shapp, supra*. The likelihood of plaintiffs' success on the merits at final hearing is strong, given defendants' admission of sex discrimina-

5. Later, on June 7, 1977, the defendants advised the district court and the parties that they intended to hire an additional 350 police officers. Under the defendants' proposal all of the 350 would have been men. The United States formally opposed the additional hiring because it did not include a hiring goal for females. On July 14, 1977 the district court signed an order which permitted the defendants to hire the 350 officers, so long as 20% were female. The City and the Fraternal Order of Police have also filed notices of appeal from that order. App. Nos. 77-2140 and 77-2141. These appeals were subsequently consolidated with the present appeals by order of our court. Hence, our determination with respect to the order of the district court of April 15 and April 25, 1977 is dispositive of these appeals taken from the district court's order of July 14, 1977.

tion in its employment practices and the dubious strength of its "BFOQ" defense. *Cf. Dothard v. Rawlinson*, 45 U.S.L.W. 4888 (U.S. June 27, 1977).

Nor can we say that the district court erred in presuming irreparable injury would result if it failed to enter a preliminary injunction. *United States v. Hayes International Corp.*, 415 F.2d 1038, 1045 (5th Cir. 1969).

Additionally, the district court's order recognized the interests of third parties and the public, and was fashioned to prevent hardship to males who had already left their jobs while preserving for females the same proportionate number of positions in the police department agreed to by the parties in the March 5 order.

Accordingly, we affirm the district court order of April 25, 1976, amending order of April 15, 1976, and the order of July 14, 1977 (App. Nos. 77-2140 and 77-2141).

C. Transfer of Juvenile Aid Officers (Policewomen) to the Position of Police Officer, Their Qualifications to Perform Non-Sector Assignments, and the District Court's Order They Be So Assigned. App. Nos. 77-1707 and 77-1708.

The March 5 order provided the opportunity to incumbent juvenile aid officers (formerly policewomen) to transfer to the redesignated job of police officer and required they be given "in special classes, any training received by policemen." The order further provided (App. 794-795):

> Each such transferee shall be expected to perform the equivalent of at least one year's police officer work unless she has had comparable experience. The question of the comparability of experience shall be submitted initially to the Police Commissioner, who shall act promptly thereon. If the parties cannot agree as to whether any such transferee's experience is comparable to that of one year's experience as a police officer, or any part thereof, the question shall be submitted to the Court for resolution. All such current Juvenile Aid Officers shall be given ninety (90) days from the date of this order (or the date plaintiffs receive their names and addresses, whichever is later) to apply to transfer.

Each woman desiring a transfer was advised by the City that (1) her application to transfer to the position of police officer was granted; (2) she did not have experience comparable to a sector patrol officer; (3) she would be required to perform at least one year of sector patrol prior to consideration for transfer to any other assignment; (4) her request for transfer to a non-sector patrol assignment was denied; (5) she was assigned to a sector patrol district; and (6) she was to report to the police academy on December 13, 1976 for training.

In addition, Sergeant Cecile Williams was informed that she was to be deprived of the privileges of her rank as sergeant for one year.

The United States moved once again for injunctive relief and, after hearing, the district court enjoined the defendants from requiring a year of sector patrol training from the incumbent female officers prior to permitting them to transfer to units within the police department.[6]

With regard to Sergeant Williams, the district court ruled that the Police Commissioner was unjustified in

6. Reviewing the Police Commissioner's initial determination of comparability of experience as it had a right to do under the March 5 order, the district court found the applicants for transfer had "sufficient comparable experience that would, with the exception of transferring to police sector patrol, entitle them to be transferred to any unit in the police department without being required to undergo one year of sector patrol." (App. 657a).

directing the removal of her supervisory authority. The court concluded "that she [Sergeant Williams] has an abundance of experience as a supervisor that should enable her to occupy the identical rank that she now holds without stripping her of her present authority." (App. 657a-658a).

The defendants filed their notice of appeal from this order on March 9, 1977. App. No. 77-1707.

The City did not transfer the applicants in accordance with their requests and the order of the district court. Accordingly, the United States moved for further injunctive relief and, on March 24, 1977, the district court entered an order requiring the immediate transfer of the females involved to non-sector patrol assignments, unless they requested patrol assignment. The district court observed that "the Police Department's obdurate failure to grant the requested assignments, has, as its genesis, the initial action instituted by female applicants for treatment and rights equal to those of their male counterparts." (App. 681a).

A notice of appeal from this order was filed by the defendants on April 22, 1977. App. No. 77-1708.

The district court did not abuse its discretion when it concluded that the females seeking transfers were qualified to perform non-sector patrol duties. They had been on the police force from two to twenty-two years, and the record adequately supports the district court's determination that their experience was comparable to one year of police officer experience, thus qualifying them to perform non-sector patrol assignments.

The defendants' argument that comparability of experience must be ascertained by comparing the applicants for transfer with a hypothetical sector patrol officer must be rejected. Because they were women, the applicants could not have been sector patrol officers and therefore could not have had experience identical to that of a sector patrol officer. To apply a sector patrol standard to a female officer would effectively nullify the transfer provisions of the March 5 order and continue the effects of defendants' discrimination.

We also reject defendants' argument that the City's general policy for male police officers has been to require they serve on sector patrol assignment. The record reflects that this avowed policy has not been pursued without exception. Moreover, even if such a policy existed, defendants waived its application here by entering into the agreement reflected in the March 5 order.

Finally, defendants' contention that the district court lacked the power to overrule the Police Commissioner's comparability determination is without merit. Such power was specifically conferred by the parties in the March 5 consent order.

When the defendants refused to assign the applicants for transfer, notwithstanding the district court's comparability determination, the court did not abuse its discretion in directing such assignment. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 764 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975). This is not, as defendants suggest, a case of a district court attempting to run the day-to-day activities of a police department. It is instead a case of a district court fulfilling its obligations under a consent order to see that the persons accorded relief under that order are given the relief to which the order entitles them.

The orders of the district court in App. Nos. 77-1707 and 77-1708 are affirmed.

D. The City's Discharge of Shirley Terry Solely Because She Was Pregnant. App. No. 77-1711.

Terry was one of the first females hired as a police officer pursuant to the March 5 order. She commenced her training on May 17, 1976 and was terminated on August 13, 1976 because she was pregnant. The notice

of termination indicated her pregnancy had commenced in May 1976 and that a City physician who had interviewed (but had not examined) her in August 1976 reported she was unable to perform the duties of a police officer. The notice then stated (App. 819-820):

> 5. Since you will be unable to participate in the Field Training which is part of the Police Academy's curriculum and the subsequent sector patrol duty which is to be performed by you from Monday, September 27, 1976 through Tuesday, November 16, 1976 (the end of the six (6) month probationary period), the Department will be unable to properly evaluate your ability to perform sector patrol duties.[7]

The United States then moved for an order directing the City to reinstate Terry as a police officer, arguing that her dismissal on pregnancy grounds violated the anti-discrimination provisions of the March 5 order, as well as Title VII and the due process clause of the fourteenth amendment. The defendants resisted, primarily on the ground that Terry's firing was justified because her pregnancy prevented her from participating in the study the City was conducting concerning the performance of the female police officers hired pursuant to the March 5 order.

After hearing, the district court denied the relief requested by the United States, accepted the defendants' argument, and found that Terry's discharge resulted from an "inability to comply with the demands

7. This notice of termination makes it clear that Terry was not terminated for the reason later asserted in the district court, and here, by the defendants, that her pregnancy disabled her from participating in the two-year study the City was conducting of the performance of the newly appointed female police officers. It would appear that the argument asserted by the defendants before the court below and in this court was an afterthought, grounded upon the understanding that a discharge for the reason stated in the notice was patently unlawful.

of police training for the required time . . . [resulting] in the determination to remove her from the test project." (App. 948-949).

The United States filed its notice of appeal on May 11, 1977.

It is clear that defendants fired Terry solely because she was pregnant. Based upon a physician's interview (and his opinion grounded upon this interview), it was presumed that she could not perform the job of police officer because she was pregnant. There was no evidence she was unable to work. *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), and *Turner v. Department of Employment Security of Utah*, 423 U.S. 44 (1975), establish that to apply a stereotyped presumption that a pregnant person is unable to work, and to deny a person the opportunity to prove otherwise, violates the due process clause of the fourteenth amendment. *See Gurmankin v. Costanzo*, 556 F.2d 184, 185 (3d Cir. 1977). Thus the district court erred in finding that the defendants were justified in discharging Terry.

Indeed, the only reliable evidence of Terry's fitness established that she was successfully performing the duties assigned to her at the time she was terminated, that she was in good health, and that she was able to perform all of her duties as a police officer as late as September 14, 1976. (App. 817-818). On the other hand, the defendants' determination was made without any medical examination, reflected the application of a presumption that a pregnant woman cannot perform police officer duties, and failed to give individual consideration to Terry herself, her abilities, and her physical condition.

As we have noted, 9 n.7, *supra*, Terry was notified that she was being discharged for a reason other than that urged before the district court and here. Whether the discharge was for the reason expressed in the termination notice, or, as later urged by the defendants,

because Terry's pregnancy prevented her from participating in the two-year study, the discharge was unlawful.

As we have indicated, if the discharge was truly for the reason expressed in the termination notice, then it could not be sustained under *LaFleur*. If, however, Terry was terminated because, as the defendants urge, she eventually would have become incapacitated due to her pregnancy, and thus could no longer participate in the study, her discharge could not be sustained as a proper exercise of the district court's discretion.

There was no requirement contained in the March 5 order that women hired pursuant to that order would have to participate continuously in a two-year study program without taking a leave of absence for pregnancy. Moreover, given the fact of the study as it was ordered, *see* n.4 *supra* (and we express no view on the validity of the study), at the least the subject of pregnancy as it might affect a police officer's performance (both during and after pregnancy) was a highly relevant concern to be considered together with all other circumstances pertaining to women in police service. As such, on this record, it was an abuse of discretion to permit Terry's termination and thus preclude consideration of this issue in the context of the two-year study. Thus the district court abused its discretion in failing to order Terry's reinstatement.[8] The order of the

8. Because of our disposition of Terry's claim, we need not decide whether her termination constitutes sex discrimination in violation of Title VII (and of the March 5 order). We note in passing that the Supreme Court has remanded this precise issue to the Court of Appeals for the Ninth Circuit "for further consideration in light of *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), and *Nashville Gas Co. v. Satty*, ___ U.S. ___ (1977), and for consideration of possible mootness." Richmond Unified School Dist. v. Berg, 46 U.S.L.W. 4032 (U.S. December 6, 1977). As the Second Circuit indicated in Women in City Government United, et al. v. City of New York, et al., No. 74-2352, slip op. at 6148 (2d Cir. September 28, 1977), equal protection violations, due process violations, and Title VII violations, are not necessarily "variations on the [same] theme."

district court is reversed in App. No. 77-1711, and the matter is remanded to the district court with the direction that the City be ordered to reinstate Terry as a police officer.

CONCLUSION

In all except the appeal at 77-1711 which is the government's appeal from the district court's order of March 11, 1977 which denied Terry's reinstatement, we will affirm the orders of the district court. These orders to be affirmed include the March 4, 1977 order of the district court, amending the February 10, 1977 order, concerned with the transfer of women police officers to formerly all-male departments (Appeal No. 77-1707); the March 24, 1977 order, also concerned with the transfer of women officers (Appeal No. 77-1708); the April 25, 1977 order amending the April 15, 1977 order, which required the hiring of 20 women police officers (Appeal Nos. 77-1709, 77-1710); and the July 14, 1977 order concerning the hiring of women police officers as a part of a new hiring of 350 police officers (Appeal Nos. 77-2140, 77-2141).

We will reverse the March 11, 1977 order of the district court which is the subject of the government's appeal at 77-1711 and will remand to the district court with the direction that the City be ordered to reinstate Shirley Terry as a police officer.

To the Clerk:

Please file the foregoing opinion.

/s/_____

Frederick B. Lacey, *U.S.D.J.*

MEMORANDUM OPINION

WEINER, *J.* APRIL 15, 1977

Presented to the Court is the motion of the United States for a preliminary injunction to enjoin the defendants from hiring any additional police officers from the current policeman eligibility list unless for every four (4) males hired as police officers one (1) female police officer is also hired.

Since the facts are undisputed the motion may be disposed of as a matter of law. From the record the following facts emerge:

(1) the police department had adopted a policy of refusing to hire females as police officers on the ground that they were not qualified to fulfill that role.

(2) on March 5, 1976, predicated upon the agreement of counsels, the Court entered an Order which, inter alia provided:

> par.1. " . . . during the pendency of this Order the City agrees and it shall not engage in any act or practice with respect to hiring . . . of police officers within the Philadelphia Police Department which has the purpose or effect of discriminating because of such individual's sex."

(3) the order also directed that one hundred (100) women were to be employed to fill vacancies in the police department out of approximately 471 existing vacancies. After their graduation from the training academy, they would be assigned to police officer positions and an independent study of their qualifications to perform the duties of a police officer would be undertaken.[1]

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1. Presently there are approximately seventy-nine (79) females who are acting police officers and their performance is being evaluated by Bartell Associates.

(4) by letter dated March 4, 1976, addressed to the Department of Justice, defendant stated that:

> "The City will provide the United States with not less than sixty (60) days notice prior to the commencement of any class at the Police Academy to fill vacancies by and the four-hundred seventy-one (471) vacancies referred to in paragraphs 4 and 5 of the subject Order if the situation should so arise."

(5) on April 1, 1977, the defendants advised the Court of their intention to appoint one hundred (100) police officers to the Police Academy for training. The class to consist of one-hundred (100) males and no (0) females.

Based upon the present state of the record, we are of the opinion that the United States is entitled to injunctive relief. That the Police department discriminates against employing women as police officers is uncontested. The threshold question that will not be resolved until all evidence, including the result of the "Bartell Study" will be presented to the Court, is whether the Police Department is justified in refusing to employ females as police officers because of the "bona fide occupational qualification" exception provided for in Section 703(e)(1) 42 U.S.C. §2000e-2(e)(1). The burden of proof is upon the defendants to demonstrate that their contention falls within the "bona fide occupational qualification" exception. *Weeks v. Southern Bell Telephone Co.*, 408 F.2d 228 (5th Cir. 1969). As previously noted, the resolution of this issue is not ripe for decision. Concluding that the defendants are prima facie in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, et seq. and presuming that irreparable injury will result from said violation, *United States v. Hayes International*, 415 F.2d 1038 (5th Cir. 1969) the Court will

enjoin the appointment of only males to the Police Academy.

A final comment. At this juncture it would appear appropriate to point out that the litigants, in formulating the terms of the March 5th Order of this Court appeared to have adopted a practical approach to the solution of this issue. We regret that a similar resolution was not arrived at in the instant matter.

ORDER

The defendants, their agents, servants, employees, attorneys and all persons in active concert and participation with them be and they hereby are restrained and enjoined, preliminarily and pending final determination of this action, from hiring and appointing to the Police Academy one-hundred (100) male police officers, said officers to be appointed on or about April 18, 1977.

IT IS SO ORDERED.

/s/_____

CHARLES R. WEINER, *J*

SUPPLEMENTAL OPINION

WEINER, *J.* APRIL 25, 1977

By Order dated April 15, 1977, we entered an order enjoining defendants from hiring and appointing one-hundred (100) males to the Police Academy. We will elaborate somewhat on our previous opinion in order to put to rest any misgiving that defendants may have as to our recognition of their contentions.

In this case court proceedings were launched against the defendants on the charges that the defendants engaged in employment practices which have resulted in discrimination on the basis of sex against female applicants for the position of policeman, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, *et seq*. During the course of several evidentiary hearings, occurring prior to March 5, 1976, the record clearly established that it was the policy of the police department to reject applications of females for employment as police officers. In fact, the defendants did not contest this allegation but to the contrary relied completely upon the "bona fide occupational qualification" exception provided for in Section 703(e)(1), 42 U.S.C. §2000e-2(e)(1). Believing that the answer to the qualification issue might be resolved by providing an opportunity for females to perform the duties of a police officer, counsel presented to the Court certain proposals which were acceptable and embodied in the Court's order of March 5th. In substance, the order provided that one-hundred (100) women were to be employed to fill vacancies in the police department out of approximately 471 existing vacancies. The male and female candidates were not chosen in the order in which their names appeared on the police eligibility list. In order to reach female candidates, it was necessary to pass over males whose position on the list was much higher than the selected females. The Order also provided for an independent study of their qualifica-

tions to cover a period of twenty-four (24) months. The plan was put into operation, females were hired, Bartell Associates is supervising the test and the Court is to be advised of the results of the experiment. With respect to future appointments, we were and remain under the impression that the letter and spirit of counsels' agreement as evidenced by the Court's Order contemplated that the proportion of females previously employed would be the standard to be adopted for all future hirings pending final decision of the Court. Without any change in circumstances the police intend to appoint one-hundred (100) males to the Police Academy excluding all females. To justify this employment practice the defendants now contend that the choice of an all male class is no longer tainted with the color of discrimination in employment because of one's sex. The stipulated facts indicated that the members of the proposed class were taken in rank order from the eligibility list. That 10,551 persons took the examination, 2,252 of whom were women. That the selected males who were to be employed had simply recorded higher marks in the examination as compared with females and thus the gender of the applicant played no part in the employment process. We need not decide that issue, however, for in our view this Court's Order of March 5th closed the question of discriminatory employment and left open only the issue of the "bona fide occupational qualification" exception. But that is not the end of our inquiry. As noted in our Opinion of April 15, 1977, the parties had agreed upon sixty (60) days' notice to be given before any new vacancies were to be filled. Unfortunately, the City, in total disregard of its agreement, advised the male members of the contemplated class of their appointment to the Police Academy. The Court has been advised that more than fifty percent of those who received this notice resigned from their previous employment and now are unemployed, their families now suffering from financial in-

security. Had the covenant been followed, it appears apparent that this incident could have been avoided as the appointees would have had sixty days' notice instead of the fourteen days' notice which was given to the plaintiff. We are of the opinion that the circumstances recited above mandate the exercise of the Court's discretion to frame a decree that would provide equitable relief. *Erie Human Relations Commission v. Tullio*, 403 F.2d 371 (3d Cir. 1974). Accordingly, the Court enters the following Amended Order.

AMENDED ORDER

AND NOW, this 25th day of April 1977, the Order of this Court dated April 15, 1977, is amended to read as follows:

In order to eliminate the hardship sustained by the proposed male appointees and to eliminate alleged discrimination because of sex pending the final resolution of this action, the defendants are directed to hire 120 persons as police officers who are to be appointed to the police academy. This class of 120 appointees shall be composed of:

(a) the 100 males who had previously been notified of their appointment, and

(b) 20 females whose names shall be selected in rank order from the current eligibility list, as suggested by the United States.

IT IS SO ORDERED.

/s/ _____

CHARLES R. WEINER, *J.*

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES	Civil Action
v.	
CITY OF PHILADELPHIA	No. 74-400

ORDER

And now, on this 13th day of July, 1977, it is ORDERED and DECREED that the City of Philadelphia may hire an additional 350 Police Officers which shall include 20% females whose names have been selected in rank order from the eligibility list.

/s/ _____
CHARLES R. WEINER, *J.*

Filed July 14, 1977

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, *Plaintiff*	Civil Action
v.	
CITY OF PHILADELPHIA, et al., *Defendants,*	No. 74-400
PENELOPE BRACE, *Plaintiff,*	Civil Action
v.	
JOSEPH F. O'NEILL, et al., *Defendants,*	No. 74-339
FRATERNAL ORDER OF POLICE, *Intervenors,*	

ORDER

These cases having come on before the Court for trial beginning on February 10, 1976, and the plaintiffs having rested on February 11, 1976, and the defendants' motion to dismiss having been denied on February 12, 1976, and the defendants having started to present their evidence in chief, it appears to the defendants, the City of Philadelphia and city officials (hereinafter referred to as "the City"), that a study will be of assistance to the Court in resolving this matter, and that while plaintiffs do not believe such a study is necessary or desirable, all parties are desirous of reducing to the extent feasible the burdens on the Court and the parties of contested litigation. The parties hereby consent to the entry of this Order. It is hereby

ORDERED, ADJUDGED, AND DECREED:

1. Defendants shall abolish the job titles of policeman and policewoman. The entry level position on the police force shall henceforth be police officer. Persons presently assigned to the policewoman position shall continue to be employed if they so choose as Juvenile Aid Officers. Until further order of this Court, and during the pendency of this Order the City agrees and it shall not engage in any act or practice with respect to hiring, assignment, discipline, retention or promotion of police officers within the Philadelphia Police Department which has the purpose or effect of discriminating because of such individual's sex. Nothing authorized by this Order shall be considered to be a violation of this provision. For the twenty-four (24) month period of the study hereinafter referred to in Paragraph three (3) hereof, the Juvenile Aid Division will continue as it is currently constituted, and vacancies as they occur, up to the number of fifteen (15) will be filled from the existing "policewoman's" list. If said limitation has a depleting effect in this unit, the City has the right to make application to the Court.

2. There are presently approximately four hundred seventy-one (471) funded vacancies in sworn positions in the Philadelphia Police Department. In filling such vacancies the City shall graduate from the police academy one hundred qualified women from the next five classes, or earlier. In any event, there shall be no less than twenty women in any such class, until those one hundred (100) women are graduated. Such persons shall be selected from the present eligibility list generated from the May 31, 1975 examination. Upon graduation from the training academy, such persons shall be assigned to police officer positions, in the same manner as other graduates are assigned.

3. The City has advised the Court that it intends to study the performance of the one hundred women

police officers hired pursuant to paragraph 2 of this Order, who in no event shall be hired later than nine (9) months from the date of this Order. The City may present the results of any such study to the Court, within twenty-four (24) months of the date upon which this Order is entered. Upon submission of the results of the study, the parties may submit any additional evidence they have and the Court shall order any further relief that may be appropriate.

4. All current Juvenile Aid Officers (formerly "policewomen") shall have the right to transfer to the category of police officer. Such transferees shall promptly be provided, in special classes, any training received by policemen which was not heretofore received by such transferees. Each such transferee shall be expected to perform the equivalent of at least one year's police officer work unless she has had comparable experience. The question of the comparability of experience shall be submitted initially to the Police Commissioner, who shall act promptly thereon. If the parties cannot agree as to whether any such transferee's experience is comparable to that of one year's experience as a police officer, or any part thereof, the question shall be submitted to the Court for resolution. All such current Juvenile Aid Officers shall be given ninety (90) days from the date of this Order (or the date plaintiffs receive their names and addresses whichever is later) to apply to transfer.

5. All Juvenile Aid Officers who apply for transfer pursuant to paragraph 4, *supra*, shall be immediately eligible for all promotions, upon successful completion of examinations comparable to the promotional examinations taken by those policemen currently on the promotion lists. Said make-up examinations shall be given promptly. To the extent that experience is a qualification for promotion, the procedure for determining equivalency shall be that provided in para-

graph 4 above. The parties agree that all current promotional vacancies shall be filled from the current lists, and that all transfer applicants shall be promoted at the same time, provided they score at least as high as the lowest man promoted in each category. The remaining female applicants shall be integrated into the balance of the promotional lists, in accordance with their scores.

6. Any female who would have been eligible for promotion under paragraph 5, *supra*, but for her lack of "policeman" experience shall receive her promotion and all other emoluments of office, including seniority and pay, plus interest, from the day she would have been promoted but for her lack of "policeman" experience to the day she actually receives her promotion. Any such pay award shall be paid to the promotional candidate when she receives her promotion.

7. Females who either transfer to the position of police officer or promote to jobs within the police officer line of progression shall retain for all purposes their seniority accrued as "policewomen" and such seniority shall be considered for all purposes to be equal to the seniority accrued by "policemen".

8. The City shall periodically, but not less frequently than every six (6) months from the date of entry of this Order, provide the Court and to the parties a report setting forth the total number of officers on the force and their job assignments, the total number of females on the force and their job assignments, and the total number of authorized sworn vacancies on the force by job assignment. In addition, the City shall, at least thirty days prior to the commencement of each training class, provide a report to the Court and each party setting forth the number, by sex, of the persons selected for each class.

9. Notwithstanding the provisions of this Order, defendants maintain that its hiring and promotion policies and practices have been and continue to be

valid and lawful until the Court enters its final decree pertaining to the validity or invalidity of the City's hiring and promotional policies and practices or any other practice.

10. The claims of Penelope Brace, and in her behalf by the United States, with respect to allegations of retaliation and resulting monetary losses, are hereby severed from the other issues in this case.

11. The Court retains jurisdiction in this matter for all purposes. The issues not addressed by this Order, including the issues of back pay, interest and other emoluments of office, if any, are deferred until twenty-four months from the date of this Order or until the results of the aforementioned study are presented to the Court, whichever is shorter.

12. The parties agree and none shall engage in any act or practice of retaliation directly or indirectly against any other party, organization, or person who has furnished information or participated on behalf of any party with regard to this lawsuit.

/s/ _____
CHARLES R. WEINER, *U.S.D.J.*

Dated: _____

Filed March 5, 19

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PENELOPE BRACE, on behalf of herself and on behalf of other similarly situated	Civil Action
v.	
JOSEPH F. O'NEILL, et al.	No. 74-339
UNITED STATES OF AMERICA	Civil Action
v.	
CITY OF PHILADELPHIA, et al.	No. 74-400

ORDER

AND NOW, this 29th day of January, 1975, upon consideration of argument and extensive discussions in Chambers, and upon consideration of the Stipulations between counsel for the United States and counsel for the City of Philadelphia (a copy of which is attached hereto as Appendix A), it is hereby Ordered:

1. The City of Philadelphia will conduct a study of the ability of women to perform "sector-patrol" and other related jobs and assignments within the Philadelphia Police Department. The study may encompass those jobs and assignments in sector-patrol work and related jobs and assignments for which male police personnel are currently eligible and for which female police personnel are not currently eligible.

2. To implement the study referred to in Paragraph 1, the City of Philadelphia shall take the following steps:

(a) The City shall give a qualifying entrance examination for patrolmen to both men and women. The examination will be given in the normal course of business, after approval of the examination by Judge John P. Fullam, in the case of *Commonwealth of Pennsylvania, et al. v. Joseph F. O'Neill, et al.*, Civil Action No. 70-3500.

(b) For purposes of this examination and the study, the qualifications necessary to take the qualifying entrance examination referred to in Paragraph (a) shall include, but not be limited to the following:

(1) Male applicants must be five feet, five and one-half inches tall, or above, and must possess all other eligibility qualifications specified for the job.

(2) Female applicants must be five feet, three and one-half inches tall, or above, and must possess all of the other eligibility qualifications specified for the job.

(c) After the examination is given an eligibility list will be developed in accordance with current practices.

(d) For the purposes of the study, an equal number of eligible men and women from the eligibility list will be selected for the next class only in the Police Academy.

(e) A report on the progress of the study will be submitted to this Court six months from the date of the initiation of the study.

3. The City shall conduct all advertising and recruiting for the entrance examination referred to in Paragraph 1, in the same manner as it normally con-

ducts such advertising and recruiting, with the understanding that all such efforts are to be directed to men and women equally.

4. Any party to the litigation may petition this Court at any time for any appropriate relief with respect to this Order, as the circumstances may warrant.

/s/_____

CHARLES R. WEINER
Judge, United States District Court for the Eastern District of Pennsylvania

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	Civil Action
v.	
CITY OF PHILADELPHIA, et al.	No. 74-400

STIPULATION

COMES NOW the undersigned counsel and stipulate as follows:

A study of policewomen performing sector-patrol duty and related assignments may be of aid to the Court in resolving the issues presently pending in the litigation before the Court. To this end counsel agree that a study may be performed by the City of Philadelphia evaluating the ability of women to perform sector-patrol and related work.

STEPHEN ARINSON
Chief Deputy City Solicitor
City of Philadelphia

MICHAEL A. MIDDLETON
SARAH T. CAMERON
Attorneys, Civil Rights Division
Employment Section
U.S. Department of Justice

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES

v. C.A. No. 74-400

CITY OF PHILADELPHIA, et al.

OPINION AND ORDER

WEINER, J. NOVEMBER 3, 1977

This Court is again confronted with the problem of the propriety of the City of Philadelphia's notification of its intent to hire an additional fifty-two (52) police officers, without stating how many of these vacancies the City intends to fill with males and females, respectively.

Pursuant to the Order of this Court an evidentiary hearing was held on November 3, 1977. Testimony adduced during the course of this hearing clearly demonstrated that the hiring of females has been and will remain short of the number of females directed by the previous orders of the Court, to be hired.

Statistical evidence indicates that the City should have hired thirty-eight (38) more females so that it would be in compliance with the Court's previous orders. However, we are not convinced that the City has contemptously disregarded our directive but we are inclined to believe that the imbalance is caused by the City's inability to secure qualified recruits. On the eligibility list of applicants there remain only fifty-three (53) females. The Court recognizes, that at this stage it is impossible with any degree of accuracy, to know how many of the fifty-three (53) will prove to be qualified as acceptable candidates. To correct the pre-

vailing disparity between male and female hirings, we believe that the City should first exhaust the list of females and recruit all qualified females before any attempt is made to employ male recruits. Subject to this condition precedent the City will be granted leave to hire fifty-two (52) additional police officers, with the further provision that a report be submitted to the Court, prior to notification to those applicants accepted for police officer training.

ORDER

Subject to the conditions set forth in this Court's opinion, the Court hereby approves the hiring of fifty-two (52) police officers.

IT IS SO ORDERED.

/s/_____

CHARLES R. WEINER, *J.*

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v. C.A. No. 74-400

CITY OF PHILADELPHIA, et al.

MEMORANDUM, OPINION AND ORDER

WEINER, *J.* JANUARY 24, 1978

The City has advised the Court and the parties that it desires to hire one hundred (100) police officer recruits during each of the months of January, March and June, 1978. Asserting that the proposal of the City would be violative of the Court's prior order requiring that the City employs "not less than one (1) female police officer recruit for every four (4) male recruits it hires until final resolution of this suit" the government has moved for a preliminary injunction which, inter alia, seeks to restrain the City from filling any police officer recruit vacancies until there is full compliance with this Court's previous Orders. From the evidence adduced during the hearing the following facts emerged. In January, 1978, the City will hire 100 police officers and also intends to hire 52 additional officers who were the subject of this Court's previous Order. From the police eligibility list there are 32 available women who have successfully completed the phases to make them eligible for employment. (N.T. 4, 5). Fred Tiedemann, administrative analyst, employed by the Philadelphia Police Department expressed the opinion that he projected an attrition rate in fiscal 1978 of 39.60 officers per month, and that for the first seven months of 1978 a shortgage of 492 police officers will

exist (N.T. 9). Chief Inspector Parker stated that in his opinion, the failure to employ additional police officers would effect the health and safety of the citizens of Philadelphia. (N.T. 17) It further appears that all females whose names are on the active list have been sent to the Police Department for processing and the department will only be able to appoint approximately 32 female applicants to positions as police officers. It also appears that the earliest time that a new list for hiring and testing new applicants could not be given until April, 1978. A new list containing the names of those who would be eligible as candidates would be on July 28, and those eligible could not enter into their positions until September, 1978 (N.T. 26, 27, 43).

We think the combination of circumstances we have noted support the conclusion that the City has not hired one female police officer recruit for every four male recruits nor will it be able to comply with this percentage in its employment of the requested additional recruits. However, we are not persuaded that the City has intentionally or wilfully disobeyed this Court's Orders. Considering the public's need for additional police officers and balancing this need against the right of women to become police officers, we believe that the legitimate interests of all concerned parties will be served by granting the government's motion in part. Therefore, since the City proposes filling 352 positions, and compliance with our orders would require that 70 females be hired, we conclude that the City will be permitted to employ 282 males during the months of January, March and June, 1978. The remaining 70 positions are to be reserved for female applicants who shall receive appointments before any male applicants are appointed. In this manner the Court is of the opinion that substantial protection will be afforded the citizenry and in the same vein will serve the interests of the female populace.

The Court strongly urges that the City drastically advance the time within which a new test will be given. In light of the fact that the City knew or should have known of the paucity of females on their active list we do not find it equitable that the extended time noticed by the City for the giving of a new test to be justified. We are unable to ascertain a reasonable cause for this delay and, therefore, again strongly urge that the new test be given promptly instead of waiting until April as contemplated by the City.

The above constitutes the Court's findings of fact and conclusions of law.

ORDER

The application of the City of Philadelphia to employ 352 police officer recruits during the months of January, March and June, 1978 is GRANTED with the proviso that of the said 352, 282 males may be employed and the remaining 70 openings shall be filled by females before any other males may be employed.

IT IS SO ORDERED.

/s/_____

CHARLES R. WEINER, *J.*